STATE OF MICHIGAN 84TH DISTRICT COURT

WEXFORD COUNTY

437 EAST DIVISION STREET
CADILLAC, MICHIGAN 49601
231-779-9515
FAX 231-779-5396

BARBARA R. GAYLOR
COURT REPORTER

BRENDA L. LEWIS
COURT ADMINISTRATOR/
MAGISTRATE

DAVID A. HOGG
DISTRICT JUDGE

LORRAINE B. GREGG
ATTORNEY MAGISTRATE

April 1, 2004

Mr. Corbin Davis
Supreme Court Clerk
P. O. Box 30052
Lansing, MI 48909

2003-04

Re: Proposed Amendments to Rules of Criminal Procedure

Dear Mr. Davis:

Please accept my following comments to the proposed amendments to our rules of criminal procedure:

MCR 6.005 (F)

The prohibition of a lawyer representing multiple defendants in the same case is well reasoned. But its impact on joinder and severance decisions should be addressed directly by MCR 6.121. Most prosecutors now seem to charge defendants individually and then move to consolidate the cases for trial. This practice will allow defendants who should be tried together to be represented by a single lawyer or firm until joinder is requested by the prosecutor. Without further clarification, trial judges will be required to guess about whether the defendant's desire to be represented by a particular lawyer should preclude consolidation under MCR 6.121(A) or if it constitutes a *substantial right* or *relevant factor* when considering severance under MCR 6.121(C) & (D).

There is no perfect answer, but I believe that judges should never be required to balance the importance of a defendant being represented by the lawyer of his or her choice against the benefits of case consolidation. Much of the information supporting the attorney-client relationship would be privileged and the process of removing a retained lawyer from a case would be highly problematic. I suggest a bright lines approach that would automatically disallow consolidation of cases when defendants are represented by the same lawyer or firm. Perhaps this change could be made:

Amend the last sentence of MCR 6.121(A) to read, "Two or more informations or indictments against different defendants may be consolidated for a single trial [whenever] if the defendants could be charged in the same information or indictment under this rule and no two defendants are represented by the same lawyer or by lawyers associated in the practice of law."

This limitation would require prosecutors to jointly charge defendants who should be tried together or suffer the risk that later consolidation would be automatically precluded by joint representation. But this burden is far less than the one that would otherwise fall upon trial judges to sort it all out afterwards. Defense lawyers and defendants would know from the outset whether an attorney-client relationship should be formed, and potential conflicts of interest would not develop.

It is far less likely that choice of counsel could be used as a basis for severance, but adding this sentence to both MCR 6.121(C) and (D) might be helpful:

"The defendant's choice to retain a lawyer who now is representing a co-defendant or who is associated in the practice of law with a lawyer now representing a co-defendant shall not be a basis for severance."

MCR 6.106 (D)(2)(o)

The second sentence of this subsection appears to be a clumsy attempt to advise parties or police officers faced with conflicting court orders that the more restrictive one applies. This does not relate to court procedure and should not be part of a court rule. Beyond that, it should not be assumed that bond conditions will necessarily be more restrictive than family court or other court orders. If this is not an attempt to effectuate the more restrictive order, it makes no sense at all, as there is simply no other logical reason that bond conditions should always trump other protective orders.

MCR 6.110

Neither our current rules nor the proposed amendments provide a procedure for waiver of preliminary examinations. Practice throughout the state varies. Some district court judges engage in arraignment-like dialog with the defendant on the record, while others require nothing more than the defendant's signature on the warrant pack bind over form. Uniformity would aid lawyers who practice in several jurisdictions. Existing authority recognizes that waiver of the right to a preliminary examination occurs by the defendant pleading guilty to the offense, even when this right is not properly addressed in

district court. *People* v *Hall,* 142 Mich App 143 (1980). Therefore, I believe that a written waiver signed by a defendant represented by counsel should be sufficient. Accepting written exam waivers, thereby reducing the need to schedule and attend hearings and to transport prisoners, would present convenience and cost savings to courts, lawyers and jail officials at little risk to represented defendants.

MCR 6.610 (F)

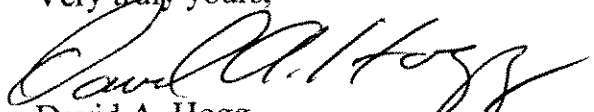
This new provision is obviously intended to extend a limited right of discovery to parties in district court, but it may have the opposite effect. I suspect that most prosecutors would comply with the requirements of MCR (F)(1)(a) by supplying a police report, rather than by creating another redundant document. Many prosecutors now have an open discovery policy for misdemeanor cases by which standard information, such as police reports, are given to defense counsel on informal request. But some offices are still reluctant to provide such information absent court order or direct legal mandate. Most misdemeanor cases are resolved by plea before the *case is set for trial* and defense lawyers need police reports to competently conduct plea negotiations. If some prosecutors interpret MCR 6.610(F)(1) as a basis to withhold police reports or similar basic information until *a case is set for trial*, the interest of justice will not be served and case flow management will be adversely affected. I believe that a better approach would be to simply allow judges to set time limits for permissible discovery by scheduling order consistent with individual scheduling practice and local custom.

MCR 6.610 (G)(2)

This may be an accurate statement of the law, but it is not a matter of procedure and it should not be the subject of a court rule.

I have commented only on proposed rules about which I have some concern. I find the major changes to be positive ones and I commend the advisory committee on a job very well done.

Very truly yours,



David A. Hogg
District Judge